Supreme Court, U.S.
FILED

No. 94-__94-82 JUL 11 1994

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In The

# Supreme Court of the United States

October Term, 1994

THE LAMAR COUNTY BOARD OF EDUCATION AND TRUSTEES, et al.,

*Appellants,*

v.

JOHNNY DUPREE, et al.,

*Appellees.*

**On Appeal From The United States District Court For The Southern District Of Mississippi**

## JURISDICTIONAL STATEMENT

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215
(601) 373-0170

WILLIAM E. ANDREWS, III
P. O. Box 130
Purvis, MS 39475
(601) 794-8053

*Counsel for Appellants, The Lamar County Board of Education and Trustees, in Their Official Capacities, Charles L. Cameron, James Sider, Tommy Graham, Freddie G. Howell and Fred Boudreaux*

July 11, 1994

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
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32 pp

## QUESTION PRESENTED FOR REVIEW

1. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed. 2d 691 (1991), to require, after the fact, that the submitting state perform the duty to "identify" "unambiguously" the pre-existing law being repealed, when the Code of Federal Regulations at the time of the submission allowed entire acts to be submitted without specific identification of the repealed statutes being changed?

2. Did the ruling below err as a matter of law by interpreting *Clark v. Roemer, supra*, to require the State in its § 5 preclearance submission to anticipate and project the impact of a new state statute on future voting, including voting at county and municipal locations subject to independent § 5 preclearance?

3. Whether, if the United States Attorney General can partially grant preclearance to portions of a statute submitted in its entirety, the burden then shifts to the United States Attorney General to identify unambiguously those portions of a voting change to which she objects, following *St. Mary's Honor Center v. Hicks*, ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993) as to requirements regarding burden of proof shifts in a remedial statute?

4. Whether a municipal school district possesses standing under § 5 of the Voting Rights Act to enjoin a state statute in the situation where the vote dilution requisite, the only "change affecting voting" for § 5 jurisdiction, is created by the municipal school district's attempt to utilize the Voting Rights Act in this

**QUESTIONS PRESENTED FOR REVIEW** – Continued

action to expand its boundaries into a predominantly white area, thereby diluting existing black voting strength within the school district?

5. Did the three-judge district court err in construing its duties under § 5 of the Voting Rights Act when it refused to accept evidence and address a remedy that would affect voting?

6. Whether, or what extent, must a federal three-judge court (1) give deference to a prior state supreme court ruling in an identical case construing § 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388 (1993) on § 2 of the Voting Rights Act, and (2) be bound by the state supreme court's construction of a previously precleared statute as a matter of state law?

7. Given (1) that the appointment (as opposed to the election) of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a one person, one vote inquiry, (2) that a city has been held warranted under the Fourteenth Amendment in extending boundaries for certain purposes without assuming responsibility for all public functions, and (3) that *Milliken v. Bradley*, 418 U.S. 717 (1974), generally has prevented equal protection challenges from being raised across district lines, can the United States Justice Department claim § 5 statutory coverage under the Voting Rights Act for a change affecting solely district boundaries for appointed school board members, particularly

**QUESTIONS PRESENTED FOR REVIEW** – Continued

after *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993)?

8. Is a certain portion of Mississippi's Uniform School Law of 1986, the Section 47 repealer of § 37-7-611, subject to preclearance procedures of § 5 of the Voting Rights Act when it affects district boundaries of appointed school board members only, and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Com'n*, 502 U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)?

## PARTIES TO PROCEEDINGS BELOW

The parties in the Court below were:

Plaintiffs: Johnny Dupree, Jeff R. Bowman, Catherine Jones and Charlotte Tullos, individually and in their official capacities as then members of the Board of Trustees of the Hattiesburg Public School District. Current Board of Trustee members are Dr. Ralph Noonkester, Marci McMahan, Daisy Thorne, Sam Buchanan and Warren G. Hood.

Defendants: Ray Mabus, in his capacity as Governor of the State of Mississippi, Mike Moore, in his capacity as Attorney General of the State of Mississippi, and the State of Mississippi.

Defendants/Intervenors: (1) The Lamar County Board of Education and Trustees, in their official capacities. At the time the action was filed, the members of the Lamar County Board were Charles L. Cameron, Rita Downs, Tommy Graham, Freddie D. Howell and Dr. Johnny R. Purvis. James Sider has replaced Stephen High who replaced Rita Downs on the Board. Fred Boudreaux has replaced Dr. Johnny R. Purvis on the Board. (2) Forrest County School District and Members of its Board of Trustees, in their official capacities. At the time the action was filed, the members of the Forrest County School Board were Bobby Patrick, Frank Myers, Mike Gilpin, John E. Clark and W. Larry Thompson. Current members of the Forrest County School Board are Mike Gilpin, Frank Myers, John E. Clark, W. Larry Thompson and Terry Ryals.

**PARTIES TO THE PROCEEDINGS BELOW** – Continued

Amicus Curiae: The United States of America has participated as amicus curiae to this proceeding since March 25, 1991.

The Plaintiffs in the Court below are the Appellees in this Court. The Appellants in this Court are the Defendants and the Defendants/Intervenors with the exception of Ray Mabus, former Governor of Mississippi, who was dismissed by the three-judge district court and is not a party to this appeal.

This Jurisdictional Statement is filed on behalf of The Lamar County Board of Education and Trustees in their official capacities. The Forrest County School District and Members of its Board of Trustees, in their official capacities, and Mike Moore, in his capacity as Attorney General of Mississippi, and the State of Mississippi are filing a separate jurisdictional statement, in which the Lamar County Board of Education also joins.

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**On Appeal From The United States District Court For The Southern District Of Mississippi**

## JURISDICTIONAL STATEMENT

## INTRODUCTION

The Appellants have filed this direct appeal from an injunction prohibiting enforcement of a Mississippi school law defining the geographic boundaries of abutting urban and county school districts. The United States District Court for the Southern District of Mississippi, in its decision dated August 27, 1993, held that the State of Mississippi had failed to meet the standards of *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991), when the State identified the Uniform School Law of 1986 in its entirety as the complete act to be submitted for review under § 5 of the Voting Rights Act, as opposed

to providing copies of statutes repealed by individual sections of the Act.

## OPINION BELOW

*Dupree v. Mabus*, 776 F. Supp. 290 (S.D.Miss. 1991), *(Dupree I) vacated and remanded, Dupree v. Moore*, ___ U.S. ___, 117 L.Ed.2d 609, 112 S.Ct. 1462, 60 U.S.L.W. 3651 (1992), on remand, *Dupree v. Moore*, 831 F. Supp. 1310 (S.D.Miss. 1993) *appeal dismissed, Moore v. Dupree*, ___ U.S. ___, 127 L.Ed.2d 69, 114 S.Ct. 872, 62 U.S.L.W. 3470 (U.S. 1994).

The Memorandum Opinion and Order of the three-judge district court on remand from this Court (*Dupree II*) is reported at 831 F. Supp. 1310 (S.D. Miss. 1993), 1993 WL 332265 and 1993 U.S. Dist. Lexis 14181 (S.D.Miss. Aug. 27, 1993). The decision is reprinted in the Appendix filed by Mike Moore, Attorney General of Mississippi, in his official capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their official capacities, at App. B, p. 3a.[1] On April 13, 1994, that decision of the three-judge district court became final by entry of its Order denying a motion

[1] The Lamar County Board of Education and Trustees in their official capacities adopt the Appendix, A through Y, which appears in the Jurisdictional Statement of Mike Moore, Attorney General of Mississippi, in his official capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their official capacities, referenced as page numbers 1a through 226a.

for new trial, to alter or amend judgment, and/or for a remedy to be fashioned. (App. A, p. 1a).

## JURISDICTION

The three-judge district court granted its injunction by entry of summary judgment on August 27, 1993, rendered final by Order entered April 13, 1994. A notice of appeal was filed on May 12, 1994. The Court has jurisdiction of this appeal pursuant to 42 U.S.C. § 1973c, 28 U.S.C. § 1253, 28 U.S.C. § 2101, and 28 U.S.C. § 2106. (App. D, p. 38a).

The Lamar County Board of Education and Trustees join the Jurisdictional Statement being filed concurrently by Mike Moore, Attorney General of Mississippi, in his official capacity and the State of Mississippi and Forrest County School District and the Members of the Board of Trustees in their official capacities, except to clarify that rulings from *Dupree I* are not to any extent foreclosed from review.

## STATUTORY AND REGULATORY PROVISIONS INVOLVED

42 U.S.C. § 1973c

This statute is reprinted in App. T, p. 222a.

28 C.F.R. 51.25 (1986)

This regulation is reprinted in App. U, p. 224a.

28 C.F.R 51.27 (1987)

Each submission should contain . . . (b) A copy of any ordinance, enactment, order, or regulation embodying the

voting practice that is proposed to be repealed, amended, or otherwise changed.

28 C.F.R 51.35 (1986)

This regulation is reprinted in App. V, p. 226a.

28 C.F.R 51.54(b)(2)

The Attorney General will make the comparison based on the conditions existing at the time of the submission.

Miss. Code Ann. § 37-7-611 (1972)

This statute is reprinted in App. H, p. 153a.

Miss. Code Ann. § 37-7-103
(1972 and Supp. 1990)

The two versions of this statute are set forth in App. K, pp. 122a and 123a.

## STATEMENT OF THE CASE

This case is on appeal after remand for consideration in light of *Clark v. Roemer*, 500 U.S. 646, 111 S.Ct. 2096, 114 L.Ed.2d 691 (1991). App. G, p. 74a. The question considered by the three-judge court on remand was whether the repeal of § 37-7-611, Miss. Code Ann. (1972), was precleared following the submission by the State of Mississippi of the entire Uniform School Law of 1986. The Uniform School Law contained the repealer of § 37-7-611, at its Section 47.

This case arises from the enactment by the State of Mississippi of a comprehensive revision to its education laws, embodied in the education reform act called the Uniform School Law of 1986. (App. J, p. 78a). One section,

Section 47 of the Uniform School Law, repealed a former provision, § 37-7-611, which governed the modification of school district boundaries when territory is annexed by a city. Section 37-7-611 had held that an urban school district's geographic boundaries were coterminous with city limits. Annexations by cities therefore automatically expanded school boundaries. Another section, Section 52 of the Uniform School Law, amended Miss. Code Ann. § 37-7-103 (1972) to give the board of each school district the authority to control the geographic boundaries of the school district. Section 52 provides that a school district may move its geographic boundaries into a neighboring district only with the consent of the neighboring district. It is uncontested that Section 52 of the Uniform School Law was precleared under § 5 of the Voting Rights Act.

Prior law under § 37-7-611 had provided that when a city annexed territory, the municipal school district automatically expanded to become coextensive with the newly created city limits. The repeal of § 37-7-611 under the Uniform School Law would end the automatic expansion of school district territories to municipal boundaries upon annexation. The method of expanding a school district into neighboring territory would then reasonably be governed by Section 52 of the Uniform School Law, which required the consent of the neighboring school board before the expansion of a school district corresponding to a city's expansion would take place.

28 C.F.R. § 51.27(b)(1987) now provides that a copy of any repealed statute should be included with a § 5 submission of the repealing legislation. That specific regulation was not in effect at the time of this State's submission of the Uniform School Law of 1986.

On July 22, 1986, the State of Mississippi identified the Uniform School Law to the United States Department of Justice for preclearance under § 5 by submitting that "Mississippi Uniform School Law of 1986 . . . is submit ted . . . in its entirety," and, again, that "the complete act is submitted for review." (App. J, p. 81a).

On August 29, 1986, the Justice Department represented that it did "not interpose any objection to the voting changes occasioned by Senate Bill No. 2117 (1986) [the Uniform School Law] as identified in your July 22, 1986, letter." (App. M, p. 156a).

On March 31, 1989, the Justice Department interposed an objection to Section 47, the repealer of § 37-7-611. (App. Q, p. 183a) (specifically noting that, "we recognize that demographic patterns are not uniform throughout the state . . . ", p. 184a). After the State asked for reconsideration, (App. R, p. 187a) the Justice Department again determined it would not withdraw the objection by its letter of May 25, 1990 (App. S, p. 217a) arguing that the Justice Department should not have the responsibility of uncovering prospective voting changes "of which the state itself seemingly was unaware at the time the prior submissions were made." (App. S, p. 219a).

This civil action commenced on February 23, 1990, when the members of the Hattiesburg School District, individually and in their official capacities, filed suit against the Governor and Attorney General of the State of Mississippi. The City of Hattiesburg, within which the plaintiffs'-appellees' school district is located, had enjoyed a series of annexations into adjoining counties in 1966, 1979, 1981, 1982, 1985 and 1989. All annexations

that affected voting (except one[2]) in the City of Hattiesburg had been precleared under § 5 of the Voting Rights Act. While this case was pending, and before any ruling was issued in the instant case, the Mississippi Supreme Court determined that it had concurrent jurisdiction with the local three-judge federal district court and held that the repealer of § 37-7-611 had been precleared pursuant to § 5 of the Voting Rights Act and further held that Section 52 of the Uniform School Law was "a subsequent enactment covering a field of operation co-existent with [§ 37-7-611]" that "cannot by any reasonable construction be given effect while the prior law remains in existence because of irreconcilable conflict between the two acts." *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 945, 963 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992). These judgments by the State Supreme Court were dismissed without discussion by the three-judge federal court in *Dupree II* by the single sentence footnote 10: "Hence, this court does not find persuasive the holding in *Greenville Public School District v. Western Line Consolidated School District*, 575 So.2d 956 (Miss. 1990), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), which held that the Attorney General had in effect precleared the repeal of § 37-7-611 when he precleared Section 52." (App. B, p. 21a, n. 10).

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[2] The 1966 annexation into Lamar County was never precleared by the United States Justice Department. The 1966 annexation is the only Lamar County area sending children to school in Hattiesburg.

The Justice Department had concluded that repealing the automatic school district annexation provisions of § 37-7-611 would be "likely to create a class of city voters (for the most part predominately white) who will not reside in the city school system yet may vote for the city governing body which, under Mississippi law, appoints the city school board." (App. Q, p. 185a). The Justice Department also noted that the State of Mississippi had provided "no explanation for the establishment of such a political system which appears not only to have the potential to impact negatively on the influence of minority city school district residents but also to treat black voters differently from white voters." (App. Q, p. 185a).

There have been no evidentiary hearings below. The case was disposed of on summary judgment when the three-judge district court held that enforcement of the repealer of § 37-7-611 was enjoined and denied the appellants Forrest and Lamar school districts' and the state's motion to fashion a remedy.

## ARGUMENT

### MISSISSIPPI'S SUBMISSION WAS PROPER

When the State submitted the Section 47 repealer of § 37-7-611 in the Uniform School Law to the United States Attorney General in 1986, there was no requirement in effect that the State provide and/or identify pre-existing statutes as a part of its submission. The regulations of the Justice Department then in effect did not make it incumbent upon the State to identify specifically the pre-existing law when it described the new provisions of state

law which were to go into effect if precleared.[3] As the District Court found, "While the text of Section 47 appeared in the notebook [submitted by the State], the texts of the 23 provisions repealed by Section 47 were not included." (App. B, p. 21a) and, "[h]ence, the State's submission failed to mention that pre-existing Mississippi law provided for automatic expansion of municipal school districts without requiring the consent of the school board governing the affected, annexed territory." (App. B, p. 20a).

The dissent in the three-judge district court below points out that this ruling exceeds the holding of *Clark v. Roemer*, 500 U.S. 646, 11 S.Ct. 2096, 114 L.Ed.2d 691 (1991). The set of circumstances here presented raises questions of due process requirements for notice to submitting authorities of regulations imposed by the Department of Justice. A question is presented as to whether the Justice Department should be estopped from applying regulations other than those in effect when the submission was first made.[4] Additionally, this ruling below raises questions of retroactive application of civil rights rules. *Compare, Landgraf v. USI Film Products*, and *Rivers v. Roadway Express, Inc.*, ___ U.S. ___, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) with *Powell v. Nevada*, ___ U.S. ___, 114 S.Ct. 1280,

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[3] The pertinent regulations are now changed, the old – 28 C.F.R. 51.25(b) is supplanted by the new 28 C.F.R. 51.27 (b)(1987) providing that a copy of any repealed statute should be included with the § 5 submission of the repealing legislation.

[4] The Justice Department states its view in opposition to retroactivity at 28 C.F.R. 51.54(b)(2): "The Attorney General will make the comparison based on the conditions existing at the time of the submission."

1994 U.S. LEXIS 2655, 128 L.Ed.2d 1, 62 U.S.L.W. 4203 (1994). It would be appropriate to remand this case for consideration of the retroactive application of Justice Department regulations.

## THE DECISION BELOW RAISES QUESTIONS AS TO THE PROPER GEOGRAPHIC FOCUS OF A § 5 SUBMISSION

The impact of the three-judge court's ruling would be to require the submitting authority not only to anticipate regulatory changes, but also to anticipate the impact of a new state statute on future voting, including voting at county and municipal locations subject to independent § 5 review. There is nothing in *Clark v. Roemer, supra,* which requires or addresses this result. There is a question as to what is the proper geographic focus for a voting rights claim, that is, whether a statewide overview or a geographically compact denomination of minority interests is correct. This issue was raised this term in *Johnson v. De Grandy,* 794 F. Supp. 1076; 815 F. Supp. 1550 (N.D.Fla. 1992), *cert. granted,* ___ U.S. ___, 113 S.Ct. 2410, 124 L.Ed.2d 634 (1993), *aff'd in part and rev'd in part on other grounds.* 1994 U.S. LEXIS 5082 (June 30, 1994).

The United States Supreme Court should determine in this case the appropriate range for a § 5 submitting authority.

## THE BURDEN OF PROOF MUST SHIFT TO THE UNITED STATES ATTORNEY GENERAL

Last term, this Court decided *St. Mary's Honor Center v. Hicks,* ___ U.S. ___, 113 S.Ct. 2742, 125 L.Ed.2d 407

(1993), to establish the point at which the burden of proof would shift in civil rights employment suits brought under Title VII. The Court and the parties needed to know who would bear the burden of going forward or the burden of persuasion.

In 1986 and thereafter, uncertainty developed in § 5 of the Voting Rights Act as to whether the State continued to bear the burden of proof after it had submitted its proposed new legislation for preclearance. The law required the Attorney General to request additional information, or object, if not satisfied with the submission. Much of the confusion in this case has developed because the Justice Department did not request further information, and did not clearly object. Instead, the United States Attorney General sent what appeared to be its boilerplate preclearance letter. Nowhere did that letter unambiguously identify the voting changes to which the Justice Department had objection, neither did it request further information. To use St. Mary's as a parallel, the Justice Department not only did not identify a reason for its objection, it did not identify the objection itself. The State, having identified its new Uniform School Law, had received what appeared to be a preclearance letter rather than an objection or request for more information from Justice. It was this lack of clear statement from the United States Attorney General which led to the three-judge district court's decision in *Dupree I*, 776 F. Supp. 290 (S.D. Miss. 1991) that, because the United States Attorney General had not objected, Section 47 was precleared.

Although the three-judge district court did not abide by that result in its more recent decision, the confusion, which has been produced throughout this case, is more

the product of the ambiguity of the Justice Department's transmittal than the fault of any concealment of information on the part of the State. The Justice Department should be clear and understandable in its response to § 5 submissions. It would be helpful to all parties, in this and other cases, to have clearly delineated the burdens of proof, so that such confusion can be avoided in the future.

## THE DISTRICT COURT ERRED IN CONSTRUING ITS DUTIES UNDER § 5 OF THE VOTING RIGHTS ACT WHEN IT REFUSED TO ACCEPT EVIDENCE AND ADDRESS A REMEDY THAT WOULD AFFECT VOTING.

The three-judge district court rejected the opportunity to accept evidence and ruled on this case by summary judgment, as a matter of law. (Order, App. A, p.1a and App. B, p. 3a *et seq.*). It did make critical fact findings however, such as its finding that a prediction of white controlled city and school district elections was correct. The Court refused to accept proof as to how to fashion an appropriate remedy. This ruling below leaves the parties in doubt as to how to hold elections.

*Brooks v. Georgia Board of Elections* held that a three-judge court has limited discretion to fashion an appropriate remedy in a § 5 action, 790 F. Supp. 1156 (S.D.Ga. 1990). This recent Brooks decision highlights a split of authority in the courts below regarding the scope of the remedial powers of a three-judge district court in a § 5 voting rights case. For example, *Dotson v. City of Indianola*, 521 F. Supp. 934 (N.D. Miss. 1981), *aff'd*, 455 U.S. 936, 102 S.Ct. 1424, 71 L.Ed.2d 646 (1982), held that the

appropriate remedy must be tailored to affect voting and not geographic territory, by refusing to de-annex unprecleared annexed territory but enjoining the annexed citizens from voting in city elections.

Does the court below possess jurisdiction under § 5 to carve up the Lamar County School District, as the Hattiesburg School District plaintiffs demand? It would be appropriate to remand this case for further consideration for the fashioning of an appropriate remedy.

## THE PLAINTIFF MEMBERS OF THE HATTIESBURG MUNICIPAL SCHOOL DISTRICT LACK STANDING; THEY PRESENT NO COGNIZABLE INJURY UNDER § 5 OF THE VOTING RIGHTS ACT

To find § 5 jurisdiction, the Court below had to find changes in voting practices and procedures. In *Dupree I*, the three-judge court held that Section 47 of the Uniform School Law resulted in a class of city voters who did not reside in the city school system, but who did participate in city elections, which led to the appointment of the school district members, thereby indirectly affecting the vote.[5] However, enjoining Section 47, on the city school board's own argument, brings about an automatic extension of the school district boundaries to be coterminous with the city limits. The result is that the same class of voters, presumably white, who will now reside in both

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[5] See discussion of changes affecting voting in *Dupree II*. (App. B, pp. 7a and 8a). Notice that the sections quoted in *Dupree II* make reference to "voting" in every clause; (App. B, p. 7a); there is no mention of indirect impact upon appointive officers, a point discussed more fully *infra*.

the city and the school district, still vote in the city elections, still elect those who appoint the school board, and so still dilute minority voting strength.

This Court recently stated that the dimensions of a governing authority "is a 'standard, practice, or procedure with respect to voting' " because it "increases or diminishes the number of officials for whom the electorate may vote," *Holder v. Hall*, ___ U.S. ___, 1994 U.S. LEXIS 5083 (June 30, 1994), p. 9 (O'Connor, J., concurring) because "this change bears 'on the substance of voting power' and has 'a direct relation to voting and the election process.' " (internal cites omitted), *Id.*, p. 47 (Blackmun, Ginsburg, JJ, dissenting). As this Court has defined standing in the voting rights context: "unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.*, p. 10 (O'Connor, J. concurring).

The Plaintiff Hattiesburg school board should not have standing to seek the very dilution of minority voting strength which gives rise to § 5 jurisdiction in this matter.

## THE DISTRICT COURT HAS CREATED AN IMPENDING COLLISION BETWEEN THE VOTING RIGHTS ACT AND THE FOURTEENTH AMENDMENT

Last term in *Shaw v. Reno*, ___ U.S. ___, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993), the United States Supreme Court determined that white citizens have standing under the Fourteenth Amendment to challenge a voting rights remedy, and considered a similar issue this term and

remanded in *Louisiana v. Hays*, 839 F. Supp. 1188 (W.D.La. 1993), judgment vacated and case remanded, ___ U.S. ___, 1994 U.S. LEXIS 4889, 62 U.S.L.W. 3853, 3859 (June 28, 1994).

In the past, issues raised by the case here at bar have not found themselves subject to relief under the Fourteenth Amendment, but rather have been at the dividing line at which the courts would not recognize Fourteenth Amendment relief. There are three areas which serve as examples. First, the appointment, as opposed to the election, of school board members has been held outside the realm of Fourteenth Amendment scrutiny for purposes of a *Reynolds v. Sims*[6] "one person, one vote" inquiry. *Sailors v. Board of Education of Kent County*, 387 U.S. 105 (1967). In *Sailors*, "one person, one vote" relief was denied where a county board of education was basically appointive rather than elected, and there was some discussion that the board was fundamentally more administrative than legislative.[7] Second, a city has been held warranted under the Fourteenth Amendment in extending its boundaries for certain purposes[8] without assuming responsibility for

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[6] 377 U.S. 533 (1964)

[7] For a recent discussion touching on executive versus legislative function as a determining element for voting rights act coverage, *see Holder v. Hall, supra*, at pp. 50-51 (Blackmun, dissenting,) joined by Justice Stevens, Justice Souter, and Justice Ginsburg).

[8] The certain purposes recognized were that the city could extend its (1) police, (2) sanitary, and (3) business licensing powers to individuals living within 3 miles of the city's corporate boundaries, meeting a rational basis test under the Fourteenth Amendment.

all public functions. *Holt Civic Center v. Tuscaloosa*, 429 U.S. 60 (1978). Similarly, it may be noted that in *Town of Lockport v. Citizens for Community Action*, the United States Supreme Court stated that "A proposal that several school districts join to form a consolidated unit could surely be subject to voter approval in each constituent school district," 430 U.S. 259, 271 (1977). Under these Fourteenth Amendment cases, it appears that the boundary disputes here at issue would be beyond the reach of the Equal Protection Clause. Third, *Milliken v. Bradley*, 418 U.S. 717 (1974) has generally prevented equal-protection challenges being raised across school district lines.

Given these developments in the case law, an issue exists as to whether the United States Justice Department can claim § 5 statutory coverage under the Voting Rights Act for a change affecting district boundaries for appointed school board members. Allowing the Justice Department a broader sweep through its § 5 powers will put it on a collision course with private claims brought under the Fourteenth Amendment.

## SHOULD THE THREE-JUDGE COURT BELOW HAVE GIVEN DEFERENCE TO THE MISSISSIPPI SUPREME COURT?

Whether or to what extent must a three-judge court give deference to a prior state Supreme Court ruling on the identical issue construing § 5 of the Voting Rights Act, particularly in light of the ruling in *Growe v. Emison*, ___ U.S. ___, 113 S.Ct. 1075, 122 L.Ed.2d 388(1993), which held that a state has primacy in the redistricting domain under § 2 of the Voting Rights Act? There, relying on *Scott v. Germano*, 381 U.S. 407 (1965), the United States Supreme

Court required federal courts to recognize that the state's instrumental role in redistricting inheres in the judicial branch as well as the legislature. "Minnesota can have only one set of legislative districts, and the primacy of the state in designing those districts compels the federal courts to defer." *Ibid.*, at 122 L.Ed.2d 400. *Compare, Johnson v. De Grandy*, ___ U.S. ___, 1994 U.S. LEXIS 5082 (June 30, 1994) (Within the peculiar facts presented, the three-judge district court in Florida held properly to have refused to give preclusive effect to the State Supreme Court's decision on the same voting rights case.).

Here, during the pendency of this case, the Mississippi Supreme Court decided in *Greenville Public School Dist., et al. v. Western Line Consol. School Dist., et al.*, 575 So.2d 956 (Miss. 1990), *cert. denied*, 502 U.S. ___, 112 S.Ct. 1512, 117 L.Ed.2d 649 (1992), that Section 47 had been precleared and that if Section 47 had not been specifically precleared, it had been precleared by implication. The Mississippi Supreme Court also construed state law, by holding that Section 52 which was precleared,[9] was in conflict with Section 47 and, due to rules of statutory construction Section 52 would prevail. In light of that decision, and its subsequent denial of certiorari, the result in Greenville, Mississippi, and in any other city

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[9] Section 52 was among the 13 express submissions of the State of Mississippi specifically identified in the submission of the Uniform School Law of 1986 to which the Attorney General specifically entered no objection. (App. G, p. 84a). Since Section 52, mandating consent by all school districts before school boundaries can change, was precleared, the more specific Section 47, applying only in municipal annexations, must have been precleared.

able to litigate only in state court, will be to design city limits and school districts in accordance with Sections 47 and 52, while expanding cities, which are found under jurisdiction of the federal courts, will be enjoined from use of Section 47.[10] Thus, as in *Growe v. Emison, supra*, the State can have only one set of school districts, but the divergent results of the state and federal courts allow two different rules of law to compete.[11] The three-judge district court below has ignored the primacy of the State in designing those districts. It is this primacy to which a federal district court should be compelled to defer. *Growe v. Emison, supra*. That ruling concerning § 2 of the Voting Rights Act should be extended by analogy to § 5 of the same Act.[12]

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[10] The remedial effect and impact of Section 52 if 47 is enjoined remains undecided by the Court below.

[11] In *Hathorn v. Lovorn*, 457 U.S. 255, 269 n.23 (1982) the Court stated: "[p]ersons dissatisfied with a state court's . . . resolution of a § 5 issue in proceedings involving other parties . . . are likely to be able to litigate the issue anew in federal court." *Hathorn* did not discuss the possibility of, for example, collusive suits being brought in a chosen forum to obtain a chosen result. An issue of collusiveness with voting rights implications was presented in *LULAC v. Clements*, 999 F.2d 831 (5th Cir. en banc 1993) *cert. denied, LULAC v. Attorney General*, 127 L.Ed.2d 74, 1994 U.S. LEXIS 991, 114 S.Ct. 878, 62 U.S.L.W. 3471 (U.S. 1994).

[12] It appears unresolved whether influence dilution claims are actionable under § 2 of the Voting Rights Act. *See, e.g., Voinovich v. Quilter*, ___ U.S. ___, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1993). It also appears to be an open question as to whether the Fifteenth Amendment applies to vote dilution claims. *Id.* The coextention vel non of Section 5 and Section 2 led to a split of opinions in *Holder v. Hall, supra*.

There is also the question as to whether the District Court should be bound by the State Supreme Court's construction of a previously precleared statute. If the rulings of *Greenville, Mississippi* are construed as a matter of state law, recent pronouncements from the United States Supreme Court would seem to make it clear that the state construction would control, *e.g.*, "In construing the . . . ordinance, we are bound by the construction given it by the Minnesota court" *R.A.V. v. City of St. Paul, Minnesota*, 502 U.S. ___, 112 S.Ct. 2538, 2542, 120 L.Ed.2d 305 (1992).

## THE RULING BELOW WAS CONTRARY TO *PRESLEY V. ETOWAH* COUNTY COMMISSIONERS

Is a certain portion of Mississippi's Uniform School Law, the repealer of § 37-7-611, Section 47 of the Uniform School Law, subject to preclearance procedures of § 5 of the Voting Rights Act when it affects district boundaries of an appointed school board and does not affect any "qualification or prerequisite" or any "standard, practice or procedure with respect to voting", contrary to *Presley v. Etowah County Commissioners*, 502 U.S. ___, 112 S.Ct. 820, 117 L.Ed.2d 51 (1992)? The Court in *Dupree I* found § 5 applicable on the basis of an "indirect" effect on voting. The three-judge court below recognizes that the school district is not itself an elective body in Hattiesburg, Mississippi. The Board is appointed by the elected Hattiesburg Board of Aldermen. Last term, in *Presley v. Etowah County Commissioners, supra*, the United States Supreme Court held that changes in the appointive powers of elected officials are not subject to the Voting Rights Act.

There is, additionally, a conflict among the circuits in determining when particular political expression or organization constitutes "voting." Previously, for example, the Tenth Circuit had held that espousing or appointing a particular political viewpoint through the signing of an initiative was not "voting" within the meaning of the Voting Rights Act of 1965. *Montero v. Mayer*, 861 F.2d 603 (10th Cir. 1988) *cert. denied* 492 U.S. 921 (1989). The ruling from the three-judge district court cannot be reconciled with these prior decisions.

## CONCLUSION

This case raises many problems because it attempts to apply the Voting Rights Act at cross purposes with the Congressional intent behind that civil rights legislation. The Plaintiffs/Appellees, Hattiesburg School District, are not the disenfranchised, under-represented and poor, as the civil rights acts presume. These Plaintiffs/Appellees are the appointed members currently serving under an elected and serving city government. The Plaintiff city school district is not seeking to maximize minority voting strength, but to dilute it.

Just as the attorneys' fees provisions of the civil rights statutes are not designed to provide fees to defendants acting under color of state law, neither are the substantive provisions of the civil rights statutes intended to secure political advantage for municipal governments in ongoing turf battles. There is a risk that the three-judge district court's opinion below, left uncorrected, would lead to the future use of the Voting Rights

Act as a common weapon in the arsenal of local politicians, rather than bringing about the equalization of political representation, as was the intent of the Voting Rights Act.

Respectfully submitted,

DENNIS L. HORN
(Counsel of Record)
SHIRLEY PAYNE
HORN & PAYNE
P. O. Box 1725
Jackson, MS 39215
(601) 373-0170

WILLIAM E. ANDREWS, III
P. O. Box 130
Purvis, MS 39475
(601) 794-8053

*Counsel for Appellants, The Lamar County Board of Education and Trustees, in Their Official Capacities, Charles L. Cameron, James Sider, Tommy Graham, Freddie G. Howell and Fred Boudreaux*

July 11, 1994